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A USEFUL PROCEDURAL INNOVATION— AUDITORS IN LAW CASES.

"Auditors" for the law side of the federal courts are now legally assured. Their appointment rests upon the inherent right of the Courts to provide themselves with appropriate instruments required for the performance of their duties." The auditor's task is to define and simplify the issues, his function is, in essence, the same as that of pleading. The object is to concentrate the controversy upon the questions which should control the result. "What the district judge was seeking when he appointed the auditor was just such aid. He required it himself; because without the aid to be rendered through the preliminary hearing and report, the trial judge would be unable to perform his duty of defining to the jury the issues submitted for their determination and of directing their attention to the matter actually in issue." Thus succinctly stated are the "power" and "reason" for the appointment.

Gradually but surely the contentions to be tried by juries are being defined in specific issues and they are not left to audit long accounts or to analyze difficult and technical situations beyond the memory or the training of an expert. The Bench and Bar will, therefore, welcome the decision in *re Walter Peterson* (June, 1920, 40 Sup. Ct.). Peterson sought a mandamus to prohibit the appointment of an "auditor" by Judge Hand of the Southern District of New York to make certain preliminary investigations prior to the trial by the jury in an action on account for coal sold to the defendant. The Court held that the auditor was properly appointed for the two purposes named, viz.: (1) "To segregate those items upon which the parties agreed and

(2) to classify those actually in controversy." The power of the District Court was placed squarely in issue and was decided in the affirmative.

Manifestly, the petitioner invoked the Seventh Amendment and the "question presented, therefore, is whether the Court possesses the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential." There existed no statute authorizing the procedure and there was no common-law precedent or English law or custom prior to the Federal Constitution, authorizing the appointment of auditors before the verdict of the jury, therefore, said Mr. Justice Brandeis, the Court has to decide not only whether such appointment of auditors is consistent with the constitutional right of trial by jury, but also whether it is a power inherent in the District Court or a trial court." The plan "was apparently invented in Massachusetts" in 1818, and regularly used in the Federal Courts in the Southern District of New York and the Eastern District of Tennessee. The first reported case was tried in 1902 in the District of Massachusetts (*Primrose v. Feno*, 113 Fed. 375, 56 C. C. A. 313, 119 Fed. 801). The practice in Connecticut and Vermont took the place of a jury and therefore was not authority. The practice in New York seems now in harmony with the federal courts. The Maryland Act of 1785 (Ch. 80, § 12) seems to have been more in line.

But the distinction drawn must be carefully observed. The power vested in the "auditor" or "examiner" must not "interfere with the jury's determination of issues of fact" guaranteed by the Seventh Amendment. The power "to form and express an opinion upon the facts and items in dispute" is not objectionable, because though "admitted as evidence of facts and findings embodied therein," it will be treated, at most, as *prima facie*

evidence thereof." Besides the proceedings are subject to the supervision of the Court "and the report may be used only if, and so far as, acceptable to the Court." The order of reference instructed the auditor:

"To make a preliminary investigation as to the facts; hear the witnesses; examine the accounts of the parties and make and file a report in the office of the clerk of the court with a view to simplifying the issues for the jury; but not finally to determine any of the issues in the action, the final determination of all issues of fact to be made by the jury on the trial * * *."

The Court tendered convincing practical argument in support of its position as is proper in a matter of first impression. "The report," it contended, "being evidence sufficient to satisfy the burden of proof would tend to dispense with the introduction at the trial before the jury of evidence on any matter not actually in dispute. The appointment of the auditor would thus serve to shorten the jury trial by reducing both the number of facts to be established by evidence and the number of questions in controversy. A more intelligent consideration of the issues submitted to the jury for final determination would result."

There were few procedural obstacles or precedents, if any, in the way of the conclusion reached and Congress had not denied it. As shown, the report possessed probative force only to the extent approved by the Judge. The report was, in fact, no more than the opinion of a qualified expert, the right to whose evidence would not have been questioned in any other phase of the case, and who had the benefit of the evidence of both sides. An accounting is oftentimes as necessary to the understanding of a jury as a chemical analysis or a diagnosis. Furthermore, business men should not be obliged to go through difficult and lengthy accounting in order to reach a conclusion. After all it is the result that

will influence the juror and the result is what is given to them by the accountant. Disputed items were by direction of the reference called to the attention of the jury in a separate summary. It had been repeatedly held that old forms of practice and procedure were not required to be continued by the Seventh Amendment, but that new methods of determining what facts are actually in issue and new rules of evidence not only may be provided but are in order. "Such changes," said Brandeis, J., "are essential to the preservation of the right." Long ago it was held that "a preliminary hearing" was not fundamentally objectionable because "it involved delay in reaching the jury trial" or "because it affords opportunity for exploring in advance the adversary's evidence," also, that "the order of a court, like a statute, is not unconstitutional because it endows an official act or finding with a presumption of regularity or verity." The findings of the Interstate Commerce Commission are by statutory regulation more binding than those of an auditor, because of the absence of a judge to pass upon them. Thus the Court had a long standing and very useful and practical example for its guide in addition to the customary reference in Chancery and Admiralty. It will be borne in mind that both of these customs as well as the power vested in the Interstate Commerce Commission had been unsuccessfully attacked in court.

It is to be regretted, then, that Justices McKenna, Pitney and McReynolds could not see their way clear to join in the opinion. Those familiar with the personal views of these big and broad jurists will not imply a hostility to the simplification of the dispensation of justice although the majority decision is no more than another and long step in that direction. The Bar will hail the declaration of the "inherent power (of the Courts) to provide themselves with ap-

propriate instruments required for the performance of their duties" and will support before the forum of the people the judges brave enough to assure the expedition of justice. It is for this great principle that the lawyers have been fighting for a decade together with the determination that Congress shall set the Courts free wherever they are now prevented by statute from giving to the administration of justice the benefit of the training, intelligence, wisdom and common sense that recommended their selection.

THOMAS W. SHELTON.

NOTES OF IMPORTANT DECISIONS.

RIGHT OF ABUTTING OWNER TO LAY ELECTRIC WIRES OVER INTERVENING STREETS AND ALLEYS.—A recent decision of the Missouri Supreme Court discusses many interesting questions concerning the right of abutting owners upon streets and alleys to use the same for conveying electric light and power in such a way as does not interfere with the city's easement of a right-of-way. *Holland Realty & Power Co. v. City of St. Louis*, 221 S. W. Rep. 51.

In this case plaintiff corporation is the owner of a large office building on Seventh street in the City of St. Louis. Three alleys separate this building from adjoining buildings on the south, west and north. The abutting owners on these alleys, holding title to the fee therein, entered into an agreement with the plaintiff corporation to supply them with electric light and power from its plant in the Holland Building. Under this agreement, made twelve years ago, plaintiff laid wires under these alleys to the adjoining buildings in the same block. During all this time, without objection from the City which had knowledge thereof, plaintiff has been supplying electricity to its neighbors. In 1920 the City served notice on the plaintiff to remove the wires, and on its refusal to comply with the order, threatened to cut the wires. Plaintiff therefore brought this action to enjoin the City from cutting and removing its wires. The trial court granted the injunction on two grounds: first, that the City was estopped to claim that plaintiff had not secured a franchise as required by city ordinance; and, sec-

ond, because, as abutting owner, plaintiff could use the land under the alley for any purpose that did not interfere with the City's easement.

In reversing and remanding the case for further proceedings the Court covered every angle of the subject involved and its conclusions are clear, if not always convincing.

In the first place the Court holds that the ground of estoppel is not sufficient to sustain plaintiff's right of user where a municipal ordinance requires a permit from the City authorities before wires can be laid in a street or alley. In this point the Court said:

"When consent to use a city's public ways can be obtained only from its own legislative assembly, and in a particular mode (in this case by an ordinance), the administrative officers cannot waive the necessity of procuring consent from the assembly, and in the prescribed mode. Neither can they, by acquiescing in the use of a public way by a utility corporation, estop the city to terminate the use. *Dugdale v. Light & Power Co.*, 195 Mo. App. 243, 256, 189 S. W. 830; *Township of Bangor v. Bay City Traction Co.*, 147 Mich. 165, 110 N. W. 490, 7 L. R. A. (N. S.) 1187, 118 Am. St. Rep. 546, 11 Ann. Cas. 293, and note on page 297; *Mullins v. Kansas City*, 268 Mo. 444, 188 S. W. 193, 197; *Detroit v. Railway Co. (C. C.)*, 60 Fed. 161; *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 316, 22 C. C. A. 334."

On this question the Court's decision is in line with the weight of authority. The law on this interesting point was clearly stated by Taft, J., in *Detroit v. Railway Co.*, 60 Fed. Rep. 166, holding there could be no estoppel of a city by reason of the expenditure of much money by a street railway company, on the faith of a grant of street privileges, to deny the validity of the grant. The opinion critically examines decisions supposed to sustain an estoppel under such circumstances, and also the argument of an eminent author in favor of applying the doctrine of estoppel to municipalities in rare instances, showing clearly that no authority existed which would preclude the City to prevent, by an injunction, the railway company from occupying the streets and running cars over them. Speaking of the argument of Judge Dillon, the Court said:

"And while Judge Dillon is of the opinion (in which he is supported by many authorities) that an estoppel may be asserted against a municipal corporation to defeat its attempt to oust persons asserting private rights in a public street, he says that such cases are exceptional, and must depend on their own peculiar circumstances. But nowhere in this valuable work does he intimate, and no author-

ity has been cited which holds that a municipal corporation can be estopped in pais to deny a grant in the street to a railway corporation or other person when the statute prescribed for the corporation a particular mode of making the grant." 60 Fed. loc. cit. 166.

The Court, in the principal case, then takes up the more difficult question of the right of abutting owners who hold the fee to the center of a street or alley to use the same for any purpose which does not interfere with the City's easement of a right-of-way. The Court admits that such right obtains, and states the existing rule in the following language:

"To what extent, and for what purposes, owners of abutting property, who likewise hold title to the fee of the highways, may use the surface of the highway or the space above or below the surface, is a question so involved in uncertainty by the conflict of authority, as to wring a complaint from the highest court of the country. *Sauer v. New York*, 206 U. S. 536, 548, 27 Sup. Ct. 686, 51 L. Ed. 1176. The law of the subject is stated usually, by courts and commentators, in clear and positive language; but, in the application of the law to the varieties of uses which have been presented for adjudication of the issue, as to whether they fell within an abutter's rights, there is much disagreement. The doctrine in this state and generally is that the owner of the fee in a public way of any kind, and perhaps the holder of equitable easements in a street when the city or town owns the fee, may devote his property to such private purposes as suit him, in so far as those purposes are compatible with the needs and convenience of the general public, including, in the paramount right of the public in city streets, all contemporary urban usages and all future ones that may develop with the progress of science and social changes. *Cartwright v. Telephone Co.*, 205 Mo. 126, 103 S. W. 982, 12 L. R. A. (N. S.) 1125, 12 Ann. Cas. 249; *Ferrenbach v. Turner*, 86 Mo. 416, 56 Am. Rep. 437; 2 Elliott, *Roads and Streets* (3d Ed.) § 876. Specific benefits which the Missouri decisions have held the abutting owner is entitled to take from his fee, subject to the municipal police power, are vaults under sidewalks, stairways to basements, areas for lighting cellars, coal chutes, shade trees, passways under the surface, and possibly others. *Fehlhauser v. St. Louis*, 178 Mo. 635, 77 S. W. 843; *Pemberton v. Dooley*, 43 Mo. App. 176; *Gordon v. Peltzer*, 56 Mo. App. 599; *Jegglin v. Roeder*, 79 Mo. App. 429, and cases supra. Elsewhere underground drains, flumes and private sewers which cross streets have been sanctioned as lawful, to enable feeholders to make their ownership beneficial. *Perley v. Chandler*, 6 Mass. 455, 4 Am. Dec. 159; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Ellsworth v. Lord*, 40 Minn. 337, 42 N. W. 389."

The Court, however, holds that plaintiff cannot enjoy the rights of an abutting owner

in this case since it is a corporation whose corporate franchise specifically permits it to manufacture and sell electricity, and to lay wires in streets and alleys "on condition of the consent of the municipal authorities of the City being given." On this point the Court said:

"All the cases cited for plaintiff lack one fact which, in our judgment, must control the ruling on the proposition that plaintiff and its predecessor, in the capacity of owners of the fee and with the consent of the other owners, might lay and maintain their wires under the alleys. This fact is that the Holland Company is a franchise holding corporation, organized under the laws of this state, and to which the state granted the power to occupy the public ways of St. Louis with their appliances only on the condition of the consent of the municipal authorities of the city being given. The sovereignty of a state can grant or refuse corporate franchises at its will, and in granting them, may impose, on the exercise of them, any terms it chooses. *State v. Stone*, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. Rep. 388; *Blair v. Ins. Co.*, 10 Mo. 559, 47 Am. Dec. 129. And when a corporation accepts franchises with a condition to be performed by the company before exercising them, it is bound to comply with the condition. *Paige v. Railway Company*, 178 N. Y. 102, 70 N. E. 213; *McCormick v. Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817; *Bonham v. Taylor*, 10 Ohio, 108. The plaintiff is not only maintaining wires in its own fee without the city's consent (in itself unlawful conduct, perhaps), but it is maintaining them, too, in the fee of other proprietors, and thereby, as was said in *Cincinnati v. Diamond Light Co.*, supra, is substituting the consent of the abutters for that of the city, which the law requires it to have."

We are not inclined to agree with the Court in the last contention. The fact that an abutting owner is a corporation cannot and should not restrict its rights as an abutting owner. If such a distinction is made in this case it may be made in other cases and will impair the titles and interests in real property held by corporations. As a matter of fact plaintiff was not asserting its right to lay electric cables under the alleys upon which its property abutted under the ordinance. It was not seeking a privilege to be granted or withheld by the City, but was merely exercising one of the incidents of its ownership of the fee under the alleys, which in dedicating the alley to a public use, it had retained for itself. The franchise right in its charter did not take away or restrict its right of ownership, but was in addition thereto.

ACTIONS AGAINST THE AGENT OF THE PRESIDENT UNDER THE TRANSPORTATION ACT OF 1920.

Under the above act of Congress of February 28, 1920, it is provided that Federal control of all railroads shall terminate on the 1st day of March, 1920. A fund of \$200,000,000 was appropriated in addition to the balance already in the revolving fund created by the Federal Control Act, to compensate the owners of the railroads and for other purposes. The act provides that actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use and operation by the President of the railroads under the Federal Control Act, of such a character as prior to the Federal control could have been brought against such carriers, may, after the termination of Federal control be brought against an agent designated by the President for such purpose.

Provision is made for service of process upon any agent or officer of the carrier related to the cause of action if a contract has been made with it by or through the President for the conduct of litigation arising out of Federal control. Where no contract has been made process must be served upon such agent or officers as may be designated by or through the President. On termination of Federal control the designated agent of the President is required to file in the office of the Clerk of each District Court of the United States a statement of all carriers he has made contracts with and what agents or officers shall be served in respect to the carriers with whom he does not have contracts. The act directs that final judgments rendered against the designated agent be paid out of the revolving fund. Provision is also made that pending actions shall not abate but may be prose-

cuted to final judgment by substituting the designated agent of the President.

The President has designated John Barton Payne as his agent under the act. The office of Walker D. Hines as Director General of Railroads has been abolished. In no legal sense is John Barton Payne a successor of Walker D. Hines. The Transportation Act as far as actions are concerned is very similar to the Federal Control Act, and by analogy it would follow that under this act the Government again gives its consent to be sued; that plaintiff is limited to a right of action against the agent named in the act and that any judgment recovered reaches only such sources of payment as provided for in the act.¹ If it is true that any judgment obtained against the agent of the President is collectable only out of the revolving fund, a suit filed against the agent would certainly be more in the nature of a suit *in rem* rather than a suit *in personam*. If this is the correct theory of the action some complications may be avoided by reason of the fact that one of the parties to the suit is the United States Government and further by reason that the suit is against an agent who had no connection whatever with the facts sued on. The action being *in rem* the Court should declare the claim established and declare that same constitutes a lien on the revolving fund. Whether the judgment declares the lien or not it is probable the courts would hold that a judgment against John Barton Payne, Agent of the President under the Transportation Act of 1920, would constitute an equitable lien on said fund and be entitled to payment in its due order irrespective of later judgments declaring specific liens.

R. O. STOTTER.

Waco, Texas.

(1) Hubert v. Baltimore & O. R. Co., 259 Fed. 361.

A PLEA FOR A PERMANENT INTERSTATE UNIFORM LEGISLATIVE COMMISSION.

The immense and growing quantity of reported cases finds its source in the numerous cases tried. A large percentage of these cases find their source in controversies incident to conflict in or an uncertainty or ignorance of the written and unwritten law or a difference existing in the construction of the governing rules relating to all kinds of intercourse in our different states, and every legislature organized as above noted turns into this eddying current its turbid tide of inaccurate, inconsistent, incongruous statutes, all of which help to swell the congested and swollen stream. So that legislation, litigation, and publication lead on abreast to the distress of the business world, the destruction of domestic tranquility, and the burden of the taxpayer, the Bench and Bar.

It is a hackneyed subject and legal and other literature is filled with its product. It is a fruitful source of inspiration to lecturer, press and Bar, and will continue to be so until some definite step is taken looking toward relief. Men are certain to legislate; no true American exists who is not a natural born legislator; combined within himself are all the elements of a real Solon, and there is no way to prevent legislation. The American citizen litigates rather than yield when he thinks he is right, challenges his adversary to sue and hotly informs him that he will get his pay at the end of a law suit. If cases are tried, opinions must be written, and there is no way to prevent publishers from printing. This, then, is the condition that has produced within thirty years more state and other reports, not to mention digest and cyclopaedias, than were produced in a hundred years before. Is the situation hopeless? Must we sit idle, and helplessly

by and suffer a continuation of the condition depicted? If we must, I submit it should be only after every reasonable effort for relief has been exhausted. It should be only after every experiment tendered promising any cure, amelioration or palliation, has been tried out and found wanting. And if then the difficulty is not subject to successful treatment, it will be the first great problem confronting our people to the solution to which they have not been equal.

In the latter seventies, there was organized at Saratoga Springs, New York, the American Bar Association, one of the objects of whose being as declared in the preamble to its constitution, is to promote the administration of justice and uniformity of legislation throughout the union. A child of its genius is the organization known as the Commissioners on Uniform State Laws, the membership of which is made up of men appointed by the governors of the different states of the union, who serve without pay and who meet annually at the same time and place as the Association, and the sole object of whose organization is to promote the uniformity of state laws. The first meeting of the commission so organized was held in 1892, and year after year since then these patriotic volunteers without pay in the army of the common good, have been meeting, discussing laws, and recommending to the legislatures of the different states of the union, a number of uniform statutes upon propositions on which the desirability and the availability of uniform legislation passes without dispute. The Uniform Negotiable Instrument Act, proposed, has been adopted in about forty states and territories; the Uniform Warehouse Receipts Act in about twenty and a Uniform Sales Act in six states and territories. It is in the hope of seeing an extension of the idea of which the object of this organization is the embodiment that this pa-

per is written in the belief that therein is presented the only substantial plan promising permanent rational relief from the conditions mentioned. Speaking of the importance of the work of this commission, Mr. Stimson in his first report, says:

"It is probably not too much to say that this is the most important juristic work undertaken in the United States since the adoption of the Federal Constitution. By all means let this work go on. Every state should take part in formulating uniform laws, and then in enacting them. The State Bar Associations should lend their powerful influence in their own states to make this first attempt successful. But at the best the work of the State Commission, so long as it is confined to a few disconnected subjects, however successfully the laws of the states may be harmonized on these few subjects, will be only a partial consummation of the unification of the law which the people of the country demand and will ultimately obtain. The State Commissions have begun the work in the only way in which it could be begun, but the next step is in the formulating and enacting of codes upon several topics of the law, which shall be not only the codes of the states but of the nation."

President Kibler, of the Ohio State Bar Association, speaking to the same subject, said:

"This body of eminent men, not elected but appointed upon merit, who, without a vestige of legislative power or authority, by the sheer worth of their accomplishments as to matters of vital importance to the welfare of the whole people are, in fact, legislating for the federal good, are in a sense greater than Congress itself."

And quoting from Judge Simeon E. Baldwin:¹

"The existence of the American Conference as a permanent body was one of the causes that encouraged the Netherlands to call the first Hague Conference. Its work ought to be forwarded by all who are interested in advancing the unity of American jurisprudence."

And speaking of the general subject, Judge Brewster of Connecticut,² said:

"The argument for greater legal unity lies in the national unity. Our people today in their business, contractual and commercial relations, are one people—one, just as they are one and homogeneous in language, education, literature, and in their whole civic and social life. They are one in a unity such as never before existed in this, or any other great country. The constantly increasing interstate trade and traffic, interstate migration, and the wonderful development of the means of intercommunication, fuse and unite all interests and localities. Variance, dissonance, subdivision of the one American people, in the general laws affecting the whole people in their business and social relations cannot but produce perplexity, uncertainty and damage. Such diversity, always an annoyance, is often a nuisance. It is harmful and injudicious in the same way, in kind if not in degree, as it would be for us to have fifty different languages, or fifty different metric systems. The business man may well ask why should not the meaning and effect of a promissory note, a bill of lading, or a guaranty be as certain and definite and practically identical in all the states as the meaning of words in an American dictionary and for the same reason, the common convenience of all."

But how can the full fruition of the example and labors of this body be best attained, for as commendable and exalting as its labors and efforts are, it must be conceded that its achievements have not been commensurate with its deserts. One writer, John L. Scott³ suggests that under the power vested in the federal constitution to provide for general welfare, Congress should establish a bureau of commissioners for the purpose of devising uniform laws for recommendation to the different states. This was fifteen years ago, but up to date no bureau has been established. Another proposition of similar import was presented the year previous by the late Leonard A. Jones of

(2) 25 American Law Review 832.

(3) 52 Albany Law Journal 61.

(1) 17 Harvard Law Review 403.

Boston in an address to the Virginia State Bar Association, proposing an enactment by Congress of a statute providing for the appointment of commissioners whose duties it would be to frame codes for all the states to be submitted to the state commissioners, and after receiving the approval of the commissioners of two-thirds of the states, should then be submitted to the different legislatures for their adoption. This suggestion likewise has failed in receiving favorable action. A similar article by William L. Snyderk read before the American Bar Association in 1892 (46 Albany Law Journal, 185) contains the statement that "the reform must be secured by the voluntary action of the states." Taking the course of the entire matter, and viewing all that has been said, written and accomplished, this sentence spoken at the time of the organization of the commission it seems to me to carry with it the final word on the whole subject, for I believe it is futile to look to Congress for favorable action. While it is true the object is of importance to the people of the nation, it is the states themselves which must finally act; and this action it seems to me should be along the line of organization of a more permanent body than the present one. For, as Mr. Jones in the article referred to, says:

"It is hardly possible for state commissioners as now constituted to undertake to frame such codes as are necessary—these codes would require years of constant labor and this would be a work of vast difficulty."

Therefore, profiting by and continuing the valued example set by the present commission, and in no degree offering a criticism, I would suggest a uniform statute to be presented to the different legislatures of the states of the nation providing for the appointment of a permanent Uniform Interstate Legislative Commission of not exceeding three in each state (and possibly two would be

sufficient) who should hold their positions for life or during good behavior or at any rate for a term of considerable length and whose salary would be sufficient to attract to its service the best legal talent of that state. This commission should be required to meet for two sessions annually of sixty days each or for such further period as they might themselves elect, at such times and places as they might fix. For instance, its sessions in the winter might be held at some southern and in the summer at some northern capital, and their duties in such sessions would be to formulate and recommend to the different state legislatures of the nation uniform codes upon all general subjects of the law, the scope being largely left to their own discretion. With the completion of each specified act it should be transmitted to the different state legislatures with the recommendation of these official commissioners accompanied by an argument for its adoption. These men from their previous training and the experience they would acquire in performing the duties of their office, would attain the highest possible degree of proficiency in the art and science of legislation and rapidly bring order out of the chaos which now exists in our state statute laws. In addition to the great relief which would come to the social and business interests of the nation as a result of their labors, there would be an immense time salvage in every state legislature at its every session. The beneficial effects by reason thereof would be felt throughout the nation. Moreover, if uniform statutes could be submitted for the consideration of fifty appellate courts instead of as many different statutes to as many different courts, there would naturally grow up a body of uniform construction upon these statutes and each state would thereby secure the full benefits of the labors of the courts of all the other states, rather

than merely their own, for as was said by Mr. Amasa M. Eaton, President of the Commissioners of Uniform State Laws (July, 1909):

"In the decision of cases arising under uniform laws, courts of last resort are showing a tendency to follow the decisions on the same question in other states that have adopted the same laws."

Under such a system, then, when a prospective litigant presented his case to the counsel in any state in the union, basing his right for recovery upon a uniform statute, his counsel would have at his hand a chance for its construction by forty-nine courts where in many instances today he would have but his own, and that one oftener than otherwise would never have reached it. His counsel discovering that the statute had been passed upon by some court would advise with more certainty than where as frequently happens today, he finds conflicting statutes with conflicting decisions and is able to advise only upon conjecture and speculation. Should he find it construed and against his client's claims, no suit would likely be brought, or should the statute be found construed favorable, and suit brought, counsel for his adversary would doubtless speedily advise his client to compromise, and thus there would be one less case tried and one less reported case would find its way into the books. Thus, this system would get for each state the full measure of benefit of the adjudication of the courts of all other states. Furthermore, if courts in the preparation of opinions were not confronted with the eternal question of where lay the weight of authority on any proposition, the opinion which they prepare could be reduced more than one-half their present length, for where the principles in the instant case had been passed upon by some court whose judgment and logic recommended its opinion as sound, but little more than a reference thereto would be necessary. Cer-

tainly courts considering a statute simultaneously, on refusing to follow a previous decision by another court, might break the current of uniformity, but this is just where a permanent official commission would prove its greatest worth, for at its next session an amendment could be considered adopted, passed, and recommended to all the state legislatures harmonizing the conflict and thus uniformity be again established and maintained. Nor, in my judgment, are the virtues of this proposition exhausted in the foregoing considerations. These state commissioners should be required to attend upon each session of their own legislatures for the purpose of advising on the uniform acts recommended and of aiding in formulating and preparing laws peculiar to each state and advising the different legislators in the proper formulation of measures to the end that internal conflicts in the statutes might be avoided. Being adepts and skilled in law making, there would be no good reason for a measure to pass the legislature with a defective title or embodying more subjects than were constitutionally permitted or in any other way leave patent constitutional defects on its face, which would bring about litigation to determine its validity. Here again would be a salvage of vast proportions to the people of the state not only in the character of the laws proposed and passed, but in the time saved to the great body of law makers at their different sessions as well as to litigants and the courts. Moreover, this commission would, through its skill and experience, possess the highest possible talent which the state could command for the codification and annotation of its laws and it should stand as a permanent code commission.

So that, surveying the entire field of duties which would naturally follow the commission and the high order of service which it would be qualified to ren-

der, to my mind there can be but little doubt that these would be the most valuable of all our public servants. Mr. Thomas A. Street⁴ says:

"The existence or nonexistence in any state of a shapely and intelligible body of statutory law cannot but be a factor that will in the end prove a potent one in its effect for good or ill on the judiciary laws of that state. This has not always been sufficiently understood and appreciated by the lawmaking profession themselves. It is the plan that if the statutory law of a state is in good shape the case law of the state is likely to develop harmoniously and upon intelligent lines; while if the statutes are unshapely, illy conceived, and unharmonious, the decisions dealing with those statutes are very apt to be in a great measure unintelligible and inconsistent. Under such conditions difficulties multiply and one illogical decision breeds another, until the case law of the state becomes very much larger in amount and much more difficult of comprehension by the lawyer than it ought to be."

Again, one of the burdens of litigation mentioned above is the question of procedure. It is uniform between practically none of the states, while if a uniform code for trial and appellate practice could be adopted generally, there is no way of computing the great benefit which would come to the litigants, the courts and the Bar therefrom. A large percentage of cases are reversed because of a misconception on the part of the trial courts or counsel in the rules of practice. Uniform statutes would be easily annotated, and if fifty courts were passing upon the same practice act, soon a body of uniform adjudications would grow up, and but few courts, and they the careless ones, would make any other than a uniform application thereof. If the multifarious decisions on practice alone could be reduced one-half, every lawyer recognizes at once the effect it would have upon the number of reported cases. This

one reform in itself would be sufficient to justify the organization of the commission suggested.

Judge Allen of the Supreme Court of Kansas said:

"To lack of uniformity in judicial procedure may be charged failure of justice, which is the most serious charge that can be brought against any judicial system; and, in addition to this, vast expenditure of money, of time and of research, which might better be otherwise employed. Through the technicalities of different courts under different state precedents and methods of procedure, come many of the delays which are conspicuous in legal matters. In suits for injury, for instance, the decision is often so long delayed by the devices of sharp practice that by the time the damages finally are paid the suitor receives no benefit from the money adjudged to be due. In probate cases there are many complications where the estate has property in different states, and the delay in settling, as is well known, often causes serious loss because of the uncertainty of the beneficiaries as to their real financial condition."

Pressing necessity for reform is beyond controversy.

Of it President Taft said:

"There is a subject upon which there may be uniformity of legislation after we in the Federal Government have adopted a proper system, and that is with reference to judicial procedure. If there is anything in our whole government, state or national, that justifies an attack upon our present system of living, it is the delays in our judicial procedures and the advantage that wealth gives in the struggle in the courts against those who haven't the means to meet the expense that is now imposed upon them."

That the remedy here proposed would not eliminate entirely all the evils noted in this article, is readily conceded, but that it offers a method which would tend in a substantial way to correct and not merely palliate must be conceded by all.

JESSE J. DUNN.

Oakland, Calif.

(4) Law Notes, February, 1910.

INSURANCE—FALSE STATEMENTS IN APPLICATION.

STANULEVICH v. ST. LAWRENCE LIFE ASSN.

Court of Appeals of New York. April 13, 1920.

127 N. E. 315.

Where application for health policy was annexed to and formed part of the contract of insurance under Insurance Law, § 58, and was signed by the insured, a material false statement therein that insured had not had any medical or surgical treatment within the preceding five years held to preclude recovery on policy, though insured could not read or write English well and had informed soliciting agent, who furnished policy, of his illness during such period.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Julius Stanulevich against the St. Lawrence Life Association. From an order and judgment of the Appellate Division (183 App. Div. 111, 170 N. Y. Supp. 161), unanimously affirming the judgment for plaintiff on a verdict of jury, and an order denying defendant's motion for new trial, defendant appeals. Judgment and order reversed, and complaint dismissed.

This is an appeal by the defendant by permission from an order and judgment of the Appellate Division of the Supreme Court, Second Department, unanimously affirming a judgment entered in the office of the clerk of the county of Dutchess on the 5th day of July, 1917, upon a verdict of a jury for the sum of \$280.52 in favor of the plaintiff, and from an order denying the defendant's motion for a new trial.

The defendant issued an insurance policy to the plaintiff, indemnifying the plaintiff for loss of time by sickness. The plaintiff claimed that he was entitled to the amount sued for by reason of his illness. The material defense is that the plaintiff, in making the application for this policy, which, in pursuance of section 58 of the Insurance Law (Consol. Laws, c. 28), was annexed to and formed part of the contract of insurance, made a material false statement when he said that he had not had any medical or surgical treatment within the past five years, which statement is conceded not to be the fact.

The plaintiff could not read or write English well, and the soliciting agent for the defendant, who furnished the policy, testified in

his behalf that he knew and the plaintiff informed him of his illness, but that he did not state the same in the application.

PER CURIAM. Upon the authority of *Bollard v. N. Y. Life Insurance Co.* (decided January 27, 1920) 228 N. Y. —, 126 N. E. 900, and *Baumann v. Preferred Accident Insurance Co.*, 225 N. Y. 480, 122 N. E. 628, the application being a part of the policy, the insured and assured are bound by its terms, as it is part of the contract of insurance. The application in question was signed by the plaintiff. The plaintiff cannot maintain his present action, and the judgment and order appealed from should therefore be reversed, and the complaint dismissed, with costs in all courts.

HISCOCK, C. J., and COLLIN, HOGAN, POUND, McLAUGHLIN, ANDREWS, and ELKUS, JJ., concur.

Judgment and order reversed, etc.

NOTE—*False Answers Knowingly Written by Company Agent and Signed by Applicant for Insurance.*—The instant case shows that it is based on the precise wording of a New York statute, the effect of which is to make an insurance policy void if material false statements are made in the application by whomsoever those answers were written therein. This view was set out at large in *Ballard v. N. Y. L. Ins. Co.*, N. Y., 126 N. E. 900, referred to in the opinion, and the reversal is of Supreme Court's construction of the *Ballard* case. It is on the terms of the N. Y. statute, which New York Court of Appeals holds is mandatory. It is not to be taken as an overturning of the principle set forth in New York decision prior to the enactment of this statute.

Thus the reversed decision cites *Sternaman v. Met. L. Ins. Co.*, 170 N. Y. 13, 62 N. E. 763, as holding that when an applicant for insurance makes truthful answers to all questions propounded by a medical examiner, who records them erroneously or falsely, this falsity will not avoid the policy. The opinion urged that the company is not deceived when its agent knows the actual facts, and therefore does not issue a policy relying on a misrepresentation and has no right to rescind.

Along this line are many cases. Thus in *Masonic L. Ins. Co. v. Robinson*, 149 Ky. 80, 147 S. W. 882, 41 L. R. A. (N. S.) 505, it was held that, if answers are made in good faith under advice of the agent and company physician, the insurer cannot avoid the policy, though the policy provided that such agent and physician are to be regarded as agents of the insured.

In this case applicant stated he had never applied to other companies and been rejected, when he had. It was averred that as the medical examiner knew the truth and there was evidence that the applicant did not understand the question referred to prior applications to other companies, there was estoppel against the company. The clause in the policy that the agent and physician were assured's agents could not displace this principle, because such statement "is, generally speaking, in direct variance with the actual facts."

It was said: "It would be manifestly unfair to permit an insurance company with full possession of facts that it intended to rely on to defeat the collection of the policy when it matured, to continue to demand and receive from the insured premiums as if his policy was a valid and binding contract that it intended to perform when the time of performance came."

For this principle the opinion cites *Fitzpatrick v. Hartford, L. & A. Ins. Co.*, 56 Conn. 116, 13 Atl. 673, 7 Am. St. Rep. 288; *Morrison v. Wisconsin Odd Fellows' M. L. Ins. Co.*, 59 Wis. 162, 18 N. W. 13; *N. W. M. L. Ins. Co. v. Amerman*, 119 Ill. 329, 10 N. E. 225, 59 Am. Rep. 799; *Chicago Guaranty Fund Life Soc. v. Ford*, 104 Tenn. 533, 58 S. W. 239; *Mod. Woodmen v. Colman*, 68 Neb. 660, 94 N. W. 814.

If a medical examiner assumes to write the answers upon his own knowledge of facts, rather than on those given by applicant, the company is estopped to claim they are untrue. *Pudritzky v. Sup. Lodge K. H.*, 76 Mich. 428, 43 N. W. 373.

And if medical examiner fills in the answers without actual knowledge of the facts and applicant signs without reading the paper, insurer cannot claim they are false. *Mod. Woodmen v. Angle*, 127 Mo. App. 94, 104 S. W. 297.

Where answers as to applicant's use of intoxicating liquors and the answers inserted by the agent showed him a good risk, the knowledge of the agent of their falsity, could not be urged by the company. *Mod. Woodmen v. Lawson*, 110 Va. 81, 65 S. E. 509, 135 Am. St. Rep. 927. Where examining physician was the doctor of the applicant and knew his answers were false, his knowledge binds the company and estops it from taking advantage of such falsity. *Franklin L. Ins. Co. v. Galligan*, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73.

It seems to me that whatever may be the terms of the New York statute on this subject, it ought to be construed to relieve a company against the effect of its fraud in taking payments on the theory of their being made on a valid, enforceable contract, which secretly it had no intention to perform when it shall have matured. If fraud might vitiate the very contract itself as to an innocent party, why should not one acting in pursuance to the fraud be bound by his acts as if the contract were altogether regular?

C.

ITEMS OF PROFESSIONAL INTEREST.

TWELVE PRINCIPLES OF INDUSTRIAL RELATIONS ANNOUNCED BY THE UNITED STATES CHAMBER OF COMMERCE.

Twelve principles of industrial relations, prepared by a special committee of the United States Chamber of Commerce were recently approved by that organization.

The Committee's report, containing the proposals submitted for a vote is given as fol-

lows: Employers' relations in American industry should accord with and express those ideals of justice, equality and individual liberty which constitute the fundamentals of our national institutions. The terms of employment should conform to the essential requirements of economic law and sound business practice. They should, through intelligent co-operation, based on a recognition of mutuality of interest conduce to high productive efficiency. They should reflect in ever-increasing degree an effort to realize broad ideals of individual and social betterment. In government and public service employment the orderly administration of government must be assured, and the paramount interest of the public protected.

With these essential purposes in view, and conscious of the obligation of management to insure their observance and practical operation in industrial affairs, the Committee on Industrial Relations of the Chamber of Commerce of the United States of America, states its belief in the following principles:

I.

Any person possesses the right to engage in any lawful business or occupation, and to enter, individually or collectively into any lawful contract, either as employer or employee. These rights are subject to limitation only through a valid exercise of public authority.

II.

The right of open-shop operation, that is, the right of employer and employee to enter into and determine the conditions of employment relations with each other, is an essential part of the individual right of contract possessed by each of the parties.

III.

All men possess the equal right to associate voluntarily for the accomplishment of lawful purposes by lawful means. The association of men, whether employers, employees or others, for collective action or dealing, confers no authority over, and must not deny any right of, those who do not desire to act or deal with them.

IV.

The public welfare, the protection of the individual and employment relations require that associations or combinations of employers or employees, or both, must equally be subject to the authority of the State and legally responsible to others and that of their agents.

V.

To develop with due regard for the health, safety and well-being of the individual, the required output of industry is the common

social obligation of all engaged therein. The restriction of productive effort or of output by either employer or employe for the purpose of creating an artificial scarcity of the product or of labor is an injury to society.

VI.

The wage of labor must come out of the product of industry and must be earned and measured by its contribution thereto. In order that the worker, in his own and the general interest, may develop his full productive capacity, and may thereby earn at least a wage sufficient to sustain him upon a proper standard of living, it is the duty of management to co-operate with him to secure continuous employment suited to his abilities, to furnish incentive and opportunity for improvement, to provide proper safeguards for his health and safety and to encourage him in all practicable and reasonable ways to increase the value of his productive effort.

VII.

The number of hours in the work day or week in which the maximum output, consistent with the health and well being of the individual can be maintained in a given industry should be ascertained by careful study and should never be exceeded except in case of emergency, and one day of rest in seven, or its equivalent, should be provided. The reduction in working hours below such economic limit, in order to secure greater leisure for the individual, should be made only with full understanding and acceptance of the fact that it involves a commensurate loss in the earning power of the workers, a limitation and a shortage of the output of the industry and an increase in the cost of the product, with all the necessary effect of these things upon the interests of the community and the nation.

VIII.

Adequate means, satisfactory both to the employer and his employes and voluntarily agreed to by them, should be provided for the discussion and adjustment of employment relations and the just and prompt settlement of all disputes that arise in the course of industrial operation.

IX.

When, in the establishment or adjustment of employment relations, the employer and his employes do not deal individually but by mutual consent such dealing is conducted by either party through representatives it is proper for the other party to ask that these representatives shall not be chosen or controlled by, or

in such dealing in any degree represent, any outside group or interest in the questions at issue.

X.

The greatest measure of reward and well-being for both employer and employe and the full social value of their service must be sought in the successful conduct and full development of the particular industrial establishment in which they are associated. Intelligent and practical co-operation based upon a mutual recognition of this community of interest, constitutes the true basis of sound industrial relations.

XI.

The State is sovereign and cannot tolerate a divided allegiance on the part of its servants. While the right of government employes—national, state, or municipal—to be heard and to secure consideration and just treatment must be amply safeguarded, the community welfare demands that no combination to prevent or impair the operation of the government, or of any government function shall be permitted.

XII.

In public service activities, the public interest and well being must be the paramount and controlling consideration. The power of regulation and protection exercised by the State over the corporation should properly extend to the employes in so far as may be necessary to insure the adequate, continuous and unimpaired operation of public utility service.

BOOK REVIEW.

FEDERAL STATUTES ANNOTATED,
SECOND EDITION.

The growth of Federal statute law in the past ten years has exceeded that of the preceding twenty years not only in volume but in importance. It used to be said that the general practitioner did not need to know much about Federal law or Federal procedure, since he would have little occasion to make use of his knowledge in the course of his practice. Today, hardly any lawyer, worthy of the name, can be said to be prepared to practice without a working knowledge of these two subjects. Fortunately, however, there have

been many praiseworthy efforts to bring together and make accessible for the busy lawyer the statute law of the United States. One of the best of these compilations, if not the best, is known as the Federal Statutes, Annotated, which in twelve volumes sets out in alphabetical order all the laws, codes and general acts of Congress in force on the first day of January, 1916.

The second edition of this work has, of course, done nothing further with the statutes except to delete those that have been repealed and to add the acts passed since the last edition, except possibly to change a few titles. The greatest change is in the annotations which have been thoroughly revised and brought down to date and enriched by the incorporation of the well-known Gould & Tucker's Notes on the Revised Statutes.

The annotations to this new edition of the Federal statutes will delight any busy lawyer. They were made under the direction of Mr. William M. McKinney, one of the greatest law editors this country ever produced. The notes stand out clear from the text and the statutes themselves are split up into sections and parts of sections with black catch headings which enables the lawyer not only to get at the very point in a statute or section in which he is interested, but also to get at the proper construction of that part of the section without wading through a lot of matter in which he is not interested.

The mechanical execution of the work is above criticism. The thin paper, the sharp difference between text and notes, the multitude of black catch headings, the convenience in size and weight of each volume make the set all that could be desired.

Printed in twelve volumes, bound in law buckram and published by the Edward Thompson Company, Northport, L. I., New York.

BOOKS REVIEWED.

A Treatise on International Law; with an Introductory Essay on The Definition and Nature of the Laws of Human Conduct. By Roland R. Foulke, of the Philadelphia Bar. In two volumes, 1920. Price, \$15.00. The John C. Winston Co., Philadelphia. Review will follow.

HUMOR OF THE LAW.

"I'm doubtful about an acquittal."

"But your client is very beautiful."

"Too beautiful, I fear. We've got a lady jury."—*Louisville Courier-Journal*.

A certain Senator, deploring the dishonest methods of one type of business man, once said, with a smile: "It all brings back to me a dialog I once heard in a Southern school. 'Children,' said the teacher, 'be diligent and steadfast, and you will succeed. Take the case of George Washington, whose birthday we are soon to celebrate. Do you remember my telling you of the great difficulty George Washington had to contend with?' 'Yes, ma'am,' said a little boy. 'He couldn't tell a lie.'"—*San Francisco Argonaut*.

The *Post-Dispatch* gives an interesting account of a day in the office where fortunate—or unfortunate—individuals make their income tax returns.

A man whose wife obtained a divorce from him in December wailed loudly when told that this made him in the eyes of the law a single man for the entire year and that he must pay an income tax on all income over \$1,000 received during 1919. Convinced at length that he must pay, he took out his checkbook and as he made out the check, he remarked:

"That's just like her. I'll bet she figured that all out and knew if she got the divorce in December it would punish me more."

Representative James A. Gallivan, of Massachusetts, who was a "wet" leader during the fight on prohibition in the House and still takes a crack whenever there is a chance at the Anti-Saloon League and its politicians, was a political reporter for Boston papers for many years, and has a native wit, which might be an obvious supposition from his name. Discussing the favorite topic—prohibition—with a group of fellow-members in the House lobby one day, Gallivan told this story:

During the tolling of the Methodist Church bell on January 16 in a small Massachusetts town in celebration of the inauguration of constitutional prohibition, a man stopped and asked the reason.

"That is the funeral dirge of poor old John Barleycorn," he was informed.

"Blamed if I knew he was a Methodist before," the man mumbled and went on his way. —*Globe-Democrat*.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Adverse Possession** — Statute of Limitation.—The statute of limitations as to personal property in the hands of a thief, who has removed it from the vicinity of the owner, or secreted it from him, does not begin to run until he returns the property to the vicinity, and openly and notoriously holds it, so that the owner may have a reasonable opportunity of knowing its whereabouts and of asserting his title.—*Chilton v. Carpenter*, Okla., 189 Pac. 747.

2. **Appeal and Error**—Nominal Damages. — Nominal damages do not compensate for a substantial injury; but if the injury is nominal an award of damages not substantial in amount will not be disturbed as inadequate.—*Greenfield v. Unique Theatre Co.*, Minn., 177 N. W. 666.

3. **Assignments**—Notice of.—Where a person entitled thereto assigns a fund in the hands of a third person, notice to holder thereof is necessary to render the assignment valid and effectual as against a subsequent assignee without notice and for valuable consideration.—*Smitton v. McCullough*, et al., Cal., 189 Pac. 686.

4. **Attachment** — Conditional Sale. — Where a conditional contract or sale of an automobile was not acknowledged or recorded, a creditor of the buyer, who became such prior

to the sale and who attached the automobile but subsequently released it, had no equity or interest surviving the release and preventing the parties to the sale from curing the defects by a surrender to the seller and the making of a new contract.—*Jester v. Naples*, Conn., 109 Atl. 894.

5. **Attorney and Client**—Settlement of Attorney.—In absence of fraud or collusion, settlement made by attorney's client extinguishes cause of action of client, which cannot thereafter be enforced by attorney to extent of his agreed compensation, attorney being remitted to independent action against defendants, which may be one at law for value of lien of which he is deforced, or possibly suit in equity to foreclose lien.—*Mills v. Metropolitan St. Ry. Co.*, Mo., 22 S. W. 1.

6. **Bankruptcy**—Composition.—A composition is not alone a contract between the bankrupt and his unsecured creditors, but also, on its confirmation, a judgment of the court having definite legal results.—*Cobb v. First Natl. Bk. of Livonia*, et al., U. S. D. C., 263 Fed. 1000.

7. **Banks and Banking** — Fictitious Payee. — Where a depositor delivered a draft, payable to one from whom she was to receive a bond and mortgage, to her attorney, who forged the bond and mortgage and the indorsement on the draft, payee thereof being a fictitious person and the property secured by the mortgage being owned by the attorney, the bank, in paying the draft to the attorney, paid it to the person intended by the depositor, and is not liable therefor.—*Strang v. Westchester County Nat. Bk.*, N. Y., 182 N. Y. Sup. 41.

8. **Bills and Notes**—Guarantor.—When, without any consideration, a person signs his name on the face of a promissory note, he becomes a guarantor of payment and is primarily liable for the debt; but when the debt is paid or secured, in whole or in part, the holder of the note may not return the payment or cancel the security and still collect from the guarantor the whole debt. The payment may not be canceled or the security released, thrown away, or impaired. The security must be held as a trust for the benefit of the guarantor; otherwise, the debt is paid to the extent and value of the security released or made unavailable.—*State Bank of Slayton v. Edwards*, et al., N. D., 177 N. W. 677.

9. **Brokers**—Burden of Proof. — Before a broker can be said to have earned his commission, he must produce a buyer within time specified in terms of agency, if time is limited, ready, willing, and able to purchase at price designated by principal; but, if principal by fraud defeats broker's efforts, case does not come within such rule.—*Ramezzano v. Avansino*, Nev., 189 Pac. 681.

10. —Dual Character.—Where real estate brokers representing adverse interests in the exchange of real estate agree to pool and divide their respective commissions according to a prearranged plan, their agreement is void as against public policy, and they can recover compensation from neither, unless such arrangement was known and assented to by both principals.—*Peaden v. Marier*, et al., Okla., 189 Pac. 741.

11.—Duty of.—A broker employed to negotiate a sale, and receiving for his services the usual commissions, is under the duty of making the

best possible bargain for his principal, and is not permitted to become personally interested in the sale, except to the extent of his commissions.—*Chester v. Campbell*, N. J., 109 Atl. 901.

12.—**Irrevocable Agency.**—The consideration which is necessary to make a power of a broker to sell land irrevocable must be independent of the compensation to be paid for the services to be performed.—*Williamson Real Estate Co. v. Sasser*, N. C., 103 S. E. 73.

13. **Carriers of Goods.**—**Last Carrier.**—Common-law rule is that right of consignee or owner to offset damages against freight charges cannot be asserted against last carrier with reference to damages on line of preceding carrier, either as to last carrier's charges or charges which it advanced to preceding carrier.—*Grand Trunk Ry. Co. of Canada v. Satuloff*, et al., N. Y., 182 N. Y. Sup. 81.

14.—**Perishable Property.**—It was carrier's duty to furnish shipper a suitable car in which to transport its peanuts, whether they were green and uncured or dried and well cured; shipper being entitled to compensation for damages to shipment by reason of carrier's negligence regardless of whether peanuts were green and uncured at time of delivery to carrier.—*Cleburne Peanut & Product Co. v. Missouri*, K. & T. Ry. Co. of Texas, Texas, 22 S. W. 270.

15. **Carriers of Passengers.**—**Last Clear Chance.**—An intending passenger, who took a position so near the track that he was liable to be injured, and had knowledge of the approach of the car, and could have retired from his dangerous position at any time before being struck, cannot recover under the doctrine of last clear chance, as the opportunity of the motorman to prevent the accident was not later in point of time than that of the intending passenger.—*Union Traction of Indiana v. Smith*, Ind., 127 N. E. 308.

16. **Champerty and Maintenance.**—**Soliciting Employment.**—Penal Law, § 270, rendering it unlawful for any layman to solicit employment for a lawyer, is not retroactive, and does not take away or affect any rights which may have attached under a contract made prior to its passage.—*Sadden v. Sebring*, et al., N. Y., 182 N. Y. Sup. 1.

17. **Commerce.**—**Employee.**—A railroad employee, engaged in drying sand for use in engines, some of which were engaged in interstate commerce, and dumping the ashes from the fires in an ash pit across a track from the sandhouse, and who, after emptying a pail of ashes, went for a drink of water, and was struck by an engine when returning for his pail, was engaged in interstate commerce.—*Erie R. Co. v. Szary*, U. S. S. C., 40 S. Ct. 454.

18.—**Reparation.**—**Assignments absolute in form of claims for reparation on account of excessive freight charges vested the legal title in the assignee, and entitled him to claim award of reparation and recover it by action at law brought in his own name for the benefit of the assignors, though the purpose of the assignment was not such as to vest him with the beneficial or equitable title.**—*Spiller v. Atchinson*, F. & S. F. Ry. Co., U. S. S. C., 40 Sup. Ct. 466.

19. **Constitutional Law.**—**Immunity from Taxation.**—Citizen or taxpayer has no vested right in statutory privileges, exemptions, or immunity from taxation.—*Pardee v. Rayfield*, District Supt. of Schools, et al., N. Y., 182 N. Y. Sup. 3.

20.—**Regulation of Utility.**—The regulation of rates for gas in the franchise of the company is an exercise of the police power through a municipality as a political subdivision of the state, and the state can thereafter modify the rates without impairing the obligation of a contract, since no contract can defeat legitimate governmental authority.—*Village of Warsaw*, et al., v. *Pavilion Gas Co.*, N. Y., 182 N. Y. Sup. 73.

21. **Contracts.**—**Excusing Performance.**—Where one party to a contract repudiates in advance his obligation and refuses to be longer bound thereby, communicating such repudiation to the other party, the latter is excused from further performance on his part.—*McCall-Dinsmore Co. v. Jackson*, Mont., 189 Pac. 771.

22.—**Lex Loci Contractus.**—When a contract is made by one having a regular domicile, it will be presumed that the law of the place of his domicile shall govern the validity of the contract, as well as its construction, though he may have been temporarily absent from his domicile when the contract was executed.—*New Domain Oil & Gas Co. v. McKinney*, Ky., 221 S. W. 245.

23.—**Modification.**—It is entirely competent for the parties to a contract to modify or waive their rights under it and ingraft new terms so long as it is executory, but after performance new terms cannot be ingrafted.—*Warley Fruit & Produce Co. v. Louisville & N. R. Co.*, Ala., 24 So. 311.

24.—**Right of Contract.**—Parties have the legal right to make such contracts as they desire to make, provided only that the contract shall not be for an illegal purpose or against public policy, and a party to a contract cannot complain of the harshness of its terms.—*S. H. Kress & Co. v. Evans*, Ariz., 189 Pac. 625.

25.—**Subsequent Acts.**—Subsequent acts of the parties in the application of the contract may be considered in determining their intention when making it.—*Morris Shoe Co. v. Coleman*, Ky., 221 S. W. 242.

26. **Corporations.**—**Dividends.**—Creditors of a corporation, who became such subsequent to the payment of dividends from its capital stock, are entitled to recover such dividends from the directors.—*Hodde v. Nobbe*, Mo., 221 S. W. 130.

27.—**Implied Authority.**—The power of a superintendent to bind his principal, a corporation, is not restricted to acts and promises made within the scope of his express authority, but includes also such as are by implication reasonably necessary to effectuate the results authorized, in the usual and customary manner.—*Napier v. Mozena Coal Co.*, W. Va., 103 S. E. 125.

28.—**Subrogation.**—Where the directors of a corporation paid a debt of the corporation secured on its property, they were subrogated to the right of the creditor to the security.—*Caldwell v. Robinson*, et al., N. C., 103 S. E. 75.

29. **Covenants.**—**Injunction.**—Where a building erected as a business building and extending beyond the line fixed for residence buildings could be used for residences as well as for business, its use as a residence will be enjoined.—*Hill*, et al., v. *Rabinowitch*, Mich., 177 N. W. 719.

30. **Criminal Law.**—**Confession.**—All that the law requires is that the confession offered in evidence should not have been the result of compulsion, either physical or moral.—*State v. Doyle*, La., 84 So. 315.

31.—**Conspiracy.**—Each party to a conspiracy to commit a crime is the agent of all the others, so that an act done by one in furthering the unlawful design is the act of all, and a declaration made by one, at the time, is evidence against all.—*State v. Conner*, et al., N. C., 103 S. E. 79.

32.—**Statutory Offense.**—Where a statute forbids a thing affecting the public, but is silent as to any penalty, the doing of it is indictable, and punishable as at common law.—*State v. Tomlin*, W. Va., 103 S. E. 110.

33. **Damages.**—**Disfigurement.**—Damages are recoverable for the shame and humiliation caused by an injury resulting in personal mutilation or disfigurement, notwithstanding the claimed difficulty of contradicting or rebutting evidence concerning mental suffering; that being a matter for the jury's consideration.—*Erie R. Co. v. Collins*, U. S. S. C., 40 S. Ct. 450.

34. **Dead Bodies.**—**Possession.**—The next of kin of a deceased person has a right to possession of the body for purposes of burial.—*Nichols v. Central Vermont Ry. Co.*, Vt., 109 Atl. 905.

35. **Dedication.**—**Abutting Owner.**—Abutting property owners may enjoin the use of land dedicated to a public purpose for any other than the purpose for which it was dedicated.—*Gulf Sulphur Co. v. Ryman*, Texas, 221 S. W. 310.

36.—**Plat.**—Where streets are "perpetually dedicated to the free use of all purchasers of lots contained in the" dedication plat, and the

streets are used by the public generally as public highways, and the city makes expenditures for lights, grading, etc., on the streets with the consent and acquiescence of the abutting lot owners, the lot owners may be estopped from denying the right of the city to make sidewalk and other improvements in the streets as authorized by its charter.—*Smith v. City of Miami*, et al., Fla., 84 So. 379.

37. **Descent and Distribution**—Pretermitted Heir.—Where testator intentionally omitted to make provision for the heirs of a son who predeceased him, those heirs are not entitled to the share in the estate which they would have received if no will had been made.—*Carver v. Wright*, Me., 109 Atl. 896.

38. **Easements**—Grant.—An easement in land can only be created by grant, although the existence of a grant may be proved in several different ways, one of which is prescription, which presupposes a grant.—*Kuhlman v. Stewart*, Mo., 221 S. W. 31.

39. **Eminent Domain**—Easement.—Where a landowner had used, by permission, a way from his land across the lands of another for several years, and the owner of the servient land, before the condemnation proceedings were instituted, tendered a deed conveying the fee to the way, no other way could be condemned.—*Strawberry Point District Fair Soc. v. Ball*, et al., Iowa, 177 N. W. 697.

40. **Equity**—Fraud.—A bill by husband and wife, seeking to set aside for fraud exchanges of properties separately owned by them for property of defendant, was not multifarious, where each of the plaintiffs had an interest in the estate of the other, and their transactions with defendant were so connected and interwoven that the question in controversy could better be raised in a single suit than in separate proceedings.—*Slater v. Ruggles*, et al., D. C., 263 Fed. 1021.

41.—Mistake of Fact.—Where a party has acted through mistake of fact, equity will never afford relief where actual knowledge could have been obtained by the exercise of due diligence and inquiry.—*Town of Townsend v. Howard's Estate*, Vt., 109 Atl. 903.

42. **Evidence**—Declaration of Agent.—Declarations of an agent while acting within the scope of his authority are admissible against the principal; and when made so as to constitute a part of the res gestae are admissible against the sureties on the principal's bond given for faithful performance of his duties.—*Coon*, et al., v. *Boston Ins. Co.*, Okla., 189 Pac. 745.

43.—Depositions.—Testimony given by deposition cannot be weighed by the jury the same as if it were given by witnesses in open court whose attitude the jury could observe and consider.—*Bohen v. N. American Life Ins. Co.* of Chicago, Iowa, 177 N. W. 706.

44.—Estoppel.—Where a buyer signed contracts in the name of a firm as its agent, he could not be permitted to contradict the plain statements of the written agreement by testifying that he signed them for his own benefit, and was doing business in such other party's name.—*Martin v. Hemphill*, et al., Texas, 221 S. W. 333.

45. **Executors and Administrators**—Fiduciary.—An executor is liable for loss sustained by beneficiaries through a sale which was without fraud by, or profit to, the fiduciary, if the loss resulted from the fiduciary's negligence.—*Barth*, et al., v. *Fidelity & Columbia Trust Co.*, et al., Ky., 221 S. W. 235.

46. **Franchises**—Strict Construction.—Grants of rights and privileges by a state or municipality are strictly construed, and whatever is not unequivocally granted is withheld; nothing passing by implication.—*Piedmont Power & Light Co. v. Town of Graham*, U. S. S. C., 40 S. Ct. 453.

47. **Fraud**—Deceit.—Where defendant, pending negotiations for a transfer of his controlling interest in a corporation to plaintiff, in settlement of difficulties between them, replaced on the books, and, without informing plaintiff, included in the sum represented as due from customers, an uncollectible account which he con-

tributed to the corporation at its organization and subsequently took back by agreement, an action of deceit would lie.—*Righter v. Parry*, Pa., 109 Atl. 917.

48. **Homestead**—Abandonment of Wife.—A married woman who has been abandoned by her husband may mortgage her separate property, whether her homestead or not, without a joinder of her husband.—*Harris*, et al., v. *Hamilton*, et al., Texas, 221 S. W. 273.

49.—Tenants in Common.—Homestead cannot exist in lands held by tenancy in common, though by husband and wife.—*Kellar*, et al., v. *Kellar*, Tenn., 221 S. W. 189.

50. **Husband and Wife**—Joint Tenancy.—The right of the wife to the joint enjoyment of the estate during the marriage is as valuable and sacred as the right of taking the entire estate by survivorship upon the death of her husband. The rights of the wife in the joint property are as sacred as those of the husband, and should be as firmly secured, guarded, and protected by laws as are his.—*Ohio Butterine Co.*, et al., v. *Hargrave*, et ux., Fla., 81 So. 276.

51. **Infants**—Compromise.—Where the compromise of a will contest was distinctly to the benefit of infant parties, a guardian ad litem of such infants under Ky. St. § 2030, may with leave of court compromise the controversy; it appearing that, if the contest was successful, the infants would lose, and, if not successful, their interest would be greatly diminished by reason of payment of costs.—*Minor v. Cecil*, et al., Ky., 221 S. W. 223.

52. **Injunction**—Labor Union.—Equity will enjoin interference by a labor union with a business by unlawful picketing and other methods of boycotting when irreparable damage will be inflicted.—*Hughes*, et al., v. *Kansas City Motion Picture Machine Operators*, Local No. 170, et al., Mo., 221 S. W. 95.

53.—Technical Right.—Injunction is often denied where its only effect would be to restrain violation of a technical right from which no damage would ensue, particularly when the writ would operate oppressively or contrary to true justice, as in the case of mandatory injunction at instance of a city to require electric companies to remove wires placed under an alley, on which they abutted, without consent by ordinance.—*Holland Realty & Power Co.*, et al., v. *City of St. Louis*, et al., Mo., 221 S. W. 52.

54. **Insurance**—Waiver.—If insurer on maturity of premium note offered to extend time for payment of insurance upon insured's making a new application and executing a new note, such offer, while not binding upon insurer until accepted by insured, would nevertheless constitute a waiver on the part of insurer of the right to enforce forfeiture.—*Roberts v. Wichita Southern Life Ins. Co.*, Texas, 221 S. W. 268.

55. **Judgment**—Estoppel.—A corporation, employing counsel appearing for defendant in a patent infringement suit, and conducting the defense at its own cost and expense, is a party to any judgment rendered, and bound thereby, but was not required to become a party to the record.—*Van Kannel Revolving Door Co. v. Winston Hotel Co.*, U. S. D. C., 263 Fed. 988.

56. **Libel and Slander**—Actionable.—Mere allegations of injury from a publication of a false writing will not make it actionable, but the inference of hurt arising out of the statement of facts, in order to become actionable, must be such an inference as is established by the general consent of men, and the inference must be judged of by the court in the first instance.—*McGregor v. State Co.*, S. C., 103 S. E. 84.

57. **Malicious Prosecution**—Definition.—A "malicious prosecution" is one that is begun in malice, without probable cause to believe it can succeed, and which finally ends in failure.—*Reade v. Halpin*, et al., N. Y., 182 N. Y. Sup. 45.

58. **Master and Servant**—Disobeying Rule.—The fact that a brakeman disobeyed a rule of the railroad in adjusting a defective coupler with his foot does not necessarily preclude a recovery, for to do so the disobedience must be the proximate cause of the injury.—*Jackson v. Pirtle*, Ind., 127 N. E. 305.

59.—Nominal Damages.—On breach of contract of employment, employee is entitled to at least nominal damages and costs.—*Ryan v. School District No. 2, Delta County, Col.*, 189 Pac. 782.

60.—Private Instruction.—The master is responsible for the act of his servant, committed in the scope of the employment, even where he departs from his instructions, or acts wrongfully, willfully, or illegally.—*Sternad v. Omaha & C. E. & St. Ry. Co., Neb.*, 177 N. W. 738.

61.—Third Party.—A negligent third party cannot, without the consent or concurrence of the employer, by settlement with an injured employee, affect or preclude the right of recovery by the employer for damages sustained by the injured workman to the extent of the compensation awarded.—*Hugh Murphy Const. Co. v. Serck, Neb.*, 177 N. W. 747.

62.—Negligence.—Imputability.—A person riding in a hired vehicle is not required, save under exceptional circumstances, to be on the lookout for danger, but may assume that the driver will exercise proper care and caution; but if he knows that the driver is incompetent or careless, or unaware of a danger, and is not taking proper precautions, it is his duty to notify the driver, and it may devolve upon him to take some other suitable action for his own protection.—*Bernhardt v. City & S. Ry. Co., D. C.*, 263 Fed. 1009.

63.—Imputability.—Negligence of automobile driver cannot be imputed to his guest, but guest cannot rely upon the care and vigilance of driver to extent of relieving himself from the exercise of reasonable precautions for his own safety at a crossing.—*Stern v. Nashville Interurban Ry., Tenn.*, 221 S. W. 192.

64.—Licensee.—If decedent was traveling over private way as a mere licensee when he was injured by fall from a bridge, owners controlling the property owed him no duty as to condition of premises, save that they could not knowingly expose him to hidden peril, or willfully cause him injury; under such right, decedent entered at his own risk.—*Clark, et al. v. City of Huntington, et al., Ind.*, 127 N. E. 301.

65.—Proximate Cause.—Negligence is the "proximate cause" of the injury only when the injury is the natural and probable result of such negligence, and in the light of attendant circumstances ought to have been foreseen by a person of ordinary intelligence and prudence.—*M. K. & T. Ry. Co. v. Stanton, Okla.*, 189 Pac. 753.

66.—Standard of Care.—The law fixes no exact standard of care other than the general one that it must be such as a reasonably prudent man would exercise in the particular circumstances.—*Fisk v. Poplin, Cal.*, 189 Pac. 722.

67.—Partnership.—Profits.—Generally a partner, who without the consent of his copartners and in competition with the business of the partnership, conducts a separate business, must turn his profits into the partnership's coffers.—*McKleroy, et al. v. Musgrave, Ala.*, 84 So. 280.

68.—Principal and Agent.—Sales Agency.—The term "agent" has a well-defined meaning which is frequently used in connection with an arrangement which does not in law amount to an agency, as where the essence of the arrangement is a bailment or sale, as in the case of a sales agency exclusive in certain territory.—*Piper v. Oakland Motor Co., Vt.*, 109 Atl. 911.

69.—Railroads.—Double Damages.—So much of section 1, chapter 5214, Acts of 1903 (section 2875, Compiled Laws 1914) as provides for the recovery of double damages for the killing of stock by railroad companies by reason of failure to fence tracks is not applicable in suits against railroads operated by the federal government under act of Congress of 1918.—*Hines, Director Gen. of Ry. v. Taylor, Fla.*, 84 S. 381.

70.—Fencing Track.—At common law there was no duty on a railroad company to fence its track, and, unless such duty is imposed by statute, failure to erect and maintain fences is not negligence rendering the company liable for killing stock on the right of way.—*Akers v. Louisville & Southern Indiana Traction Co., Ind.*, 127 N. E. 297.

71.—Right of Way.—Mere nonuser by a railroad company of a part of its right of way

does not constitute an abandonment of such unused portion.—*Union Pac. Ry. Co. v. Wooster, et al., Neb.*, 177 N. W. 740.

72.—Sales.—Anticipating Breach.—Defendant buyer's insisting on inspection contrary to the contract was an "anticipatory breach," which entitled plaintiff seller to rescind the sale contract and recover damages for its breach, without first manufacturing and tendering the goods.—*Estes v. Curtiss Aeroplane & Motor Corp., N. Y.*, 182 N. Y. Sup. 25.

73.—Delivery.—The place of delivery under a contract of sale is a question to be determined according to the intention of the parties.—*Seaver v. Lindsay Light Co., N. Y.*, 182 N. Y. Sup. 30.

74.—F. O. B.—When a seller agrees to deliver the goods sold to the buyer f. o. b. cars at the seller's place of business, the seller is under no obligation to furnish the cars in which to load the goods, in the absence of an agreement to furnish them.—*Griffin v. Edward Eiler Lumber Co., Miss.*, 84 So. 225.

75.—Option.—An "option" is a privilege given by the owner of property to another to buy the property at his election, and the owner does not sell the property, but gives to another the right to buy at his election.—*Western Union Telegraph Co. v. Brown, U. S. S. C.*, 40 S. Ct. 460.

76.—Specific Performance.—Mutuality.—A contract will not be specifically enforced, unless it is mutual, not only in its obligation, but in its remedy.—*Corney v. Kline Bldg. and Const. Co., N. Y.*, 182 N. Y. Sup. 15.

77.—Sunday.—Contracts.—That a mortgage was executed on Sunday did not render it void, where left with the mortgagor's father, at whose request it was executed, and delivered to the mortgagee on a secular day; the mortgage taking effect from the date of delivery.—*Gross, et al. v. Bank of Ensley, Ala.*, 84 So. 267.

78.—Usury.—Parol Evidence.—Despite the parol evidence rule, a written contract can be shown to be usurious by parol evidence.—*Corley v. Vizard, et al., Ala.*, 84 So. 299.

79.—Vendor and Purchaser.—General Warranty.—Where a vendor, by general warranty or quitclaim deed, has committed fraud on his vendee, he has no right to the benefits of a subsequent purchase of the land by such vendee from the actual owner thereof, nor to profit by such transaction.—*Pittsburgh Split Coal Co. v. Shackelford, et al., W. Va.*, 103 S. E. 123.

80.—Marketable Title.—The purchaser can recover, in case of the vendor's inability to make title, because of the existence of unknown mortgages, the amounts paid by him on the contract, with interest, and the expenses of the search of title.—*Schwimmer, et al. v. Roth, et al., N. Y.*, 182 N. Y. Sup. 12.

81.—Performance.—Where one contracting to purchase land unequivocally repudiated the contract and persisted in refusing to perform because of an alleged defect in the title, without allowing a reasonable time for perfecting the title, as required by the contract, a tender of the deed to him was not required.—*Massey v. Butts, et al., Mo.*, 221 S. W. 153.

82.—Wills.—Illusions.—Belief of testator trained in the church, that he could cure physical ailments by the laying on of hands, if referring to religious healing rather than osteopathic manipulations, of which he had also been a student, cannot be said to be evidence of testamentary incapacity.—*Spencer v. Spencer, et al., Mo.*, 221 S. W. 28.

83.—Pretermitted Heir.—A lawful heir cannot be disinherited except by express words or necessary implication.—*In re Robinson's Estate, Pa.*, 109 Atl. 924.

84.—Spendthrift Trust.—A devise of land to a trustee and his heirs, "to have and to hold the same in trust for the use and benefit of my son M. and his heirs, said trustee to have the sole management and control thereof, to collect the rents and pay the same to said beneficiary, said M. to have no control or disposition of said estate," created a spendthrift trust.—*Matthews, et al. v. Van Cleve, et al., Mo.*, 221 S. W. 34.